INDEX OF CASES CITED.

	PAGE
American Ry. Ex. Co. v. Levee	3, 4
Atlantic Coast Line R. R. Co. v. Mims	5
Atlas Exchange National Bank, Awotin v.	9, 12
Awotin v. Atlas Exchange Nat'l. Bank	9, 12
Cassatt v. First Nat'l. Bank, etc.	8
Central Transp. Co., Pullman's etc. Co. v.	11
Chesapeake & Ohio R. R. Co. v. Mihas	2, 4
Coon v. Smith	11
First Nat'l. Bank, etc., Cassatt, v.	8
Gates, Newman v.	6
Hartford Life Ins. Co. v. Johnson	6
Johnson, Hartford Life Ins. Co. v.	6
Knass v. Madison & Kedzie State Bank	9
Levee, American Ry. Exp. Co. v.	3, 4
Lynch v. New York, ex rel. Pierson	3
Madison & Kedzie State Bank, Knass v.	9
Mihas, Chesapeake & Ohio R. R. Co. v.	2, 4
Mims, Atlantic Coast Line Ry. Co. v.	5
Minneapolis, St. P. & S. S. Ry. Co. v. Rock	2, 4
Mullen v. Western Springs Beef Co.	5

PAGE

Cases (continued).

Newman v. Gates 6
New York ex rel. Pierson, Lynch v. 3
Pottorff, Texas & Pac. Ry. Co. v. 8
Pullman's etc., Co. v. Central Transp. Co. 11
Rock v. Minneapolis, St. P. & S. S. Ry. Co. 2, 4
Smith, Coon v. 11
Texas & Pac. Ry. Co. v. Pottorff 8
Western Springs Beef Co., Mullen v. 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 662

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

Petitioner's reply to respondent's argument under Subdivision A of Point I of its brief and argument.

Counsel for the respondent has questioned the absence of the Petition for Leave to Appeal, filed in the Supreme Court of Illinois, from the transcript of record which has been filed in this Court. Under paragraph one of Rule 38 of this Court, a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed, must be filed. The record in its technical sense is made in the trial court as was done

in this case and brought up to the Appellate Court of Illinois by writ of error. The proceedings in the Appellate Court of Illinois, together with this record, are included in the transcript filed in this Court.

The absence of the Petition for Leave to Appeal from the record as it has been filed in this Court is further justified, if justification be necessary, on the ground that the issues raised therein are immaterial to this Court's jurisdiction.

We are seeking a review, not of the decision of the Supreme Court of Illinois, but of the decision of the Appellate Court of Illinois, First District, and the record affirmatively shows that a federal question arising under the National Banking Act was presented to the Appellate Court; that the decision of that question was necessary to a determination of the cause—the special pleas and affidavit of merits squarely raised the issue—and the judgment could not have been given without deciding the issue.

The opinion of the Appellate Court shows that these questions were judicially determined by that Court, and in view of the refusal of the Supreme Court of Illinois to take jurisdiction of the cause, the decision of the Appellate Court upon the federal questions presented in the record, necessarily becomes the final adjudication in the State upon such federal questions. It should be noted that this Court has said that under the Illinois practice, the refusal of the Supreme Court to assume jurisdiction is tantamount to an affirmance of the decision of the Appellate Court of Illinois.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410.

No specific reason is given by the Supreme Court of Illinois (and none is required by statute) for its denial to grant petitioner's prayer for Leave to Appeal. However, the order of the Supreme Court of Illinois (Record p. 53), clearly shows that it considered the case as presented by the petition, record, abstract, brief and argument of the petitioner, and that upon due consideration thereof, the Court denied the Leave to Appeal. The element which confers jurisdiction upon this Court to issue its writ of *certiorari* as prayed, is the *denial* of the Leave to Appeal by the Supreme Court of Illinois.

American Railway Express Co. v. *Levee*, 263 U. S. 19, 21.

The case of *Lynch* v. *New York, ex rel. Pierson*, 79 L. ed. Adv. Op. 1, cited in respondent's brief at page two, is entirely without application. In that case, this Court was asked to review the decision of the New York Court of Appeals, which was the highest court in the State of New York, and from that decision it could not be determined that the court had decided the case on a federal or non-federal question.

In the case at bar, we are seeking to obtain a review of the decision of the Appellate Court of Illinois, which has become the decision of the highest Court of the State of Illinois, so far as this cause is concerned. As we have stated before, we are not seeking a review of the decision of the Supreme Court of Illinois. The essentials of the jurisdiction of this Court to review the decision of the Appellate Court of Illinois have been met.

Petitioner's reply to respondent's argument under Subdivision B of Point I of its brief and argument.

It is contended by the respondent under this subdivision of its argument that the petitioner did not pursue the proper method of invoking the jurisdiction of the Supreme Court of Illinois; that had another method been employed, the State Supreme Court might have assumed jurisdiction, and that, therefore, this Court has no jurisdiction.

A sufficient and complete answer to this contention is found in the fact that the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal shows that the State Court had considered the petition, record, abstract, brief and argument filed by the petitioner and overruled the prayer thereof, denying "a Leave to Appeal" (Rec. p. 53). Had the petitioner herein pursued the wrong method in seeking to invoke the jurisdiction of the State Supreme Court as claimed by the respondent, the Petition for Leave to Appeal would have been *dismissed without consideration* and not denied after a consideration of the petition, record, abstract, brief and argument, as shown by the order of the said Supreme Court of Illinois.

We repeat as applicable here what we have already said in reply to respondent's argument in sub-section A of Point I of its brief, namely, that the jurisdictional element with which this Court concerns itself in applications for writs of *certiorari* is the *refusal* of the highest state court to take jurisdiction.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410.

American Railway Express Co. v. *Levee*, 263 U. S. 19, 21.

An analysis of the cases cited by respondent in support of its contention that this Court has no jurisdiction of this case will instantly reveal that they are without application to the case at bar.

In *Mullen* v. *Western Springs Beef Co.*, 173 U. S. 116 (cited in respondent's brief as 123 U. S. 116), this Court held that it had no jurisdiction to review the decision of the Court of Appeals of Colorado.

It appears in that case that the Supreme Court is the highest court in the State and that it had jurisdiction to review the decision of the Court of Appeals had an application for such review been made to it; and that no such application had, in fact, been made. Clearly, this Court could not have reviewed the decision of the Court of Appeals, because it had not yet become the decision of the highest court in the State of Colorado from which one could have been had.

The case of *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, is one wherein this Court dismissed a writ of error for the reason that no federal question had been presented to the Supreme Court of South Carolina, whose judgment this Court was asked to review.

It appears that in the *Mims* case, the trial court had rejected an offer of certain evidence which raised a federal question. The State Supreme Court sustained that ruling and it is this decision sustaining the trial court that the defendant sought to have this Court review on writ of error. Under the pleadings in the case, no federal question had been raised and the offer of evidence was made at the second trial, after the plaintiff had completed her case.

Clearly, no federal question was decided either by the trial court or the Supreme Court of South Carolina. The

sole question decided by the Supreme Court of South Carolina was one of the local law governing procedure. This Court properly refused to review a decision on such a question.

In the case of *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, a writ of *certiorari* was prayed for the purpose of reviewing the decision of the Supreme Court of Missouri. This court dismissed the writ on the ground that no federal question had been presented to or decided by said Supreme Court of Missouri.

The facts in the case show that a question arising under the Constitution of the United States was raised for the first time in the appellate court, an intermediate court, in the defendant's brief and argument. The Supreme Court of Missouri held that the question was not properly raised under the law of Missouri and thus, like the Supreme Court of South Carolina in the *Mims* case, decided a question of procedure under local law and not a federal question.

Finally, the respondent cites and quotes from the case of *Newman* v. *Gates*, 204 U. S. 89, wherein this Court dismissed a writ of error to the Supreme Court of Indiana to review a decision of that Court which was that an appeal from the trial court to the appellate court, an intermediate court, was insufficient.

Again this Court properly held that it had no jurisdiction to review the decision of the Supreme Court of Indiana for the reason that it was based not upon a federal question, but purely on a matter of procedure under the local law of Indiana.

In none of the foregoing cases was a federal question decided by the Court whose decision this Court was asked to review. In the case at bar, as we have already pointed out, we are asking this Court to review a decision of the

Appellate Court of Illinois, which squarely decided a federal question and which, by the Supreme Court's denial of Leave to Appeal, became the decision of the highest court in the State of Illinois from which a decision of such federal question could be had.

Petitioner's reply to respondent's argument under Subdivision C of Point I of its brief and argument.

Counsel for the respondent here argues that a federal question of substance is not presented to this Court by the record in this case.

In our original brief, we cited cases in support of our contention that the liability of a national bank, under the National Banking Act, upon an implied contract to repay moneys received by it in reliance upon an *ultra vires* contract, is a federal question. Counsel for respondent says that these cases cannot be deemed as authorities in support of this Court's jurisdiction because they were decided when writs of error were granted by this Court as a matter of right.

We respectfully submit that the fact that writs of error were granted as a matter of right at the time these cases were decided does not alter the fact that this Court would not have granted the writs if no federal question had been involved. A writ of error like a writ of *certiorari* is only the vehicle by which a federal question is brought to this Court for review.

Whether the federal question presented herein is a matter of substance, we believe is undeniably answered by a mere statement of the proposition, namely: Is a national bank liable under the National Banking Act, in general assumpsit, to repay moneys received by and paid to it in reliance upon its *ultra vires* contract? Surely, there can

be no serious doubt in any one's mind that a determination and definition of the extent of a national bank's liability under the National Banking Act is a very substantial question.

Petitioner's reply to respondent's argument under Subdivision D of Point I of its brief and argument.

Under this subdivision of his argument, counsel for the respondent states that the decision of the Appellate Court of Illinois in this case is in accord with the applicable decisions of this Court and in support of this statement counsel cites the cases of *Texas & Pacific Railway Company* v. *Pottorff*, 291 U. S. 245, and *Cassatt, et al.* v. *First National Bank of West New York* (N. J.), 168 Atl. 585 (*certiorari* denied by this Court, 291 U. S. 660).

It is curious to note that counsel cites two cases which are clearly inapplicable to the case at bar and does not in any manner distinguish the cases cited by us in our original brief, and which unequivocally announced the principle that a national bank is liable on the implied contract theory for the benefits received by it upon the strength of its *ultra vires* contract.

We shall not consider the *Pottorff* case, *supra*, 291 U. S. 245, because in our original brief, we have pointed out in detail the distinctions which exist between it and the case at bar.

The *Cassatt* case (N. J.), *supra*, 168 Atl. 585, we believe is without application, because it holds that a national bank cannot act as a broker in the purchase of stocks. It does not hold that a national bank is not liable for moneys which it has received under an alleged *ultra vires* contract.

Petitioner's reply to respondent's argument under Subdivision A of Point II of its brief and argument.

The contention of counsel for the respondent on this branch of his argument is that the petitioner is not entitled to recover, in general assumpsit, upon the implied contract theory the moneys paid to the respondent by the petitioner in reliance upon the repurchase contract, because that contract is illegal and against public policy.

At the outset, we wish to call to the Court's attention that we accept the theory that the repurchase contract in this case is *ultra vires* only because it proceeded in the trial court upon that theory. The petitioner accepted the respondent's repudiation of the contract on the ground it was *ultra vires*. We do not wish, however, to be foreclosed in resisting the theory that a contract similar to the one involved in this case is *ultra vires*, nor do we wish to be deemed as having assumed inconsistent positions when we so argue in the case of *Awotin* v. *Atlas Exchange National Bank of Chicago*, pending in this Court's docket as cause No. 661. This case and the *Awotin* case are before the Court on different records.

Counsel for the respondent, in arguing this branch of the cause, relies upon the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, but that case is not in point, because it appears therein that when the defendant bank sold the bonds subject to a repurchase agreement, it was acting as a broker. The bank did not retain the proceeds of the sale, but delivered them to the maker of the bonds, its principal, less, of course, a commission for acting as a broker. The Illinois Supreme Court may have been justified in using the language cited by counsel in his brief on page 10, but because of the factual difference, that language is not applicable to the case at bar.

In the case before this Court, when the respondent sold the bonds to the petitioner, it was acting on its own account and retained the entire proceeds for its own benefit. These facts create an entirely different situation than is found in the *Knass* case, because the respondent, in selling its own assets with the agreement to repurchase them, merely substitutes a new asset for the old. If called upon to repurchase the bonds, the respondent would merely be putting itself and the petitioner in *statu quo*.

So far as any danger resulting from creating a contingent liability is concerned, that element is not present in the case at bar, because the respondent, having received the full purchase price of the bonds and knowing that it may be called upon to repurchase them, can very readily set up a reserve against such contingency, just as banks set up reserves to protect themselves from losses on loans and the depreciation of furniture and fixtures. The bank's negligence can not convert an otherwise innocuous transaction into a dangerous one.

The other cases cited by counsel for the respondent in support of his argument that the petitioner is not entitled to recover the money paid by her, are clearly not in point when we consider that the contract in question is not violative of any public policy or statutory enactment. The cases cited by counsel hold that there can be no recovery on the *quantum meruit* where a contract is illegal, and also hold that the law will leave parties to an illegal contract where it finds them and will not give to either party any relief, are not in point, because the contract in the case at bar does not violate any public policy and is not illegal or immoral, as we have already indicated.

Thus depriving the contract of any element of illegality and purging it of any taint of being contrary to public policy, the repurchase contract stands as merely being

ultra vires, and the language used by this Court in the case of *Pullman's, etc., Co.* v. *Central Transportation Co.*, 139 U. S. 24, is particularly applicable, when it said on page 60;

> "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it; the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.
>
> "In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

Respondent also argues that there is nothing in the record in this case to show any benefit received by it out of the original transaction. "Benefit" as it is used in this connection, does not mean "profit." When the petitioner paid her money to the respondent upon the inducement of the repurchase agreement, the money of the sale and the repurchase agreement constituted a single transaction, and the money thus paid to and received by the respondent was the benefit which it received. It is not necessary to show that in selling the bonds the respondent made a profit.

We believe that only a casual reading of the case of *Coon* v. *Smith*, 4 Fed. Supp. 960, will convince the Court

that the Judge predicated his decision on the right of the plaintiff in that suit to recover on the implied contract as well as, and not solely, upon the proposition laid down by the Appellate Court of Illinois in the case of *Awotin* v. *Atlas Exchange National Bank*, 265 Ill. App. 238.

Petitioner's reply to respondent's argument under Subdivision B of Point II of its brief and argument.

In this branch of respondent's argument, it is stated that to permit the respondent to recover upon an implied *assumpsit* would be substantially to permit her to recover on the *ultra vires* contract. We respectfully submit that if the amount of money to which she would be entitled under an implied *assumpsit* is substantially the same amount of money which she could recover upon the written agreement, that alone is not sufficient to deny her a recovery.

CONCLUSION.

In conclusion we respectfully submit that this Court has jurisdiction to issue its writ of *certiorari* to the Appellate Court of Illinois, First District, as prayed in the Petition for a writ of *certiorari* filed in this case; that the petitioner is entitled to recover the money paid by her to the respondent in reliance upon a contract which it has repudiated as being *ultra vires*, and that this Court, in the exercise of its jurisdiction, should issue its writ of *certiorari*.

Respectfully submitted,

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
Attorneys for Petitioner.